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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 97

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 18–24) is reported at 230 F. 2d 690. The opinion of the District Court (R. 7–11) is reported at 126 F. Supp. 646.

JURISDICTION

The judgment of the Court of Appeals (R. 24) was entered on February 24, 1956. The petition for a writ of certiorari was filed on May 21, 1956, and was granted on October 8, 1956 (R. 24; 352 U. S. 818). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the grant by the United States to respondent in 1862 of "the right of way through the public lands * * * for the construction of said railroad and telegraph line * * *" conveyed the title to oil and gas deposits underlying the right of way so that respondent may remove or dispose of such deposits.

STATUTE INVOLVED

Sections 2, 3 and 4 of the Act of July 1, 1862, 12 Stat. 489, 491–492, read as follows:

> SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.
>
> SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of

said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, * * * the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, * * * patents shall issue conveying the right and title to said lands to said company * * *; to the amount aforesaid; * * *.

STATEMENT

This action was instituted by the United States to restrain the respondent railroad company from conducting drilling operations for the discovery and removal of oil and gas underlying that portion of the company's right of way which traverses the N½ NW¼, Section 24, T. 13 N., R. 68 W., in the State of Wyoming, and to quiet title in the United States to such mineral deposits. The material facts are not in dispute, and were stipulated by the parties (R. 5–7). They are as follows:

Pursuant to the general policy of encouraging the construction of railroads, the United States, by the Act of July 1, 1862, 12 Stat. 489, authorized the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Section 2 of the Act (12 Stat. 491–492, *supra*, p. 2) provided that a "right of way through the public lands be, and the same is hereby, granted to [respondent's predecessor in title] for the construction of said railroad and telegraph line." The right of way extended for two hundred feet on each side of the railroad when located. There were also granted by Section 3 (*supra*, pp. 2–3) in fee five alternate sections per mile within a belt of ten miles on each side of the road "for the purpose of aiding in the construction of said railroad and telegraph line," but "all mineral lands" were expressly excepted from the Act. It was further provided, as to this "place land" grant, that such lands, if not sold or disposed of by the grantee within three years after completion of the entire road, should be subject to

settlement and pre-emption, like other lands, and that the purchase price be paid to the grantee company.[1]

It was stipulated and accordingly found as a fact that respondent and its predecessor have complied in all respects with the requirements of the Act granting the right of way, have built the railroad and telegraph line, and have at all times been using the right of way for the purposes set out in the Act of July 1, 1862, and that no portion of the right of way has been abandoned (Stip., p. 5, R. 5; Fdg. 5, R. 12).

It was further stipulated and found that the subject of this litigation in the "nature of the title to and the parties' interest in" that portion of the right of way traversing the "N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P. M., in the State of Wyoming," and that the title to the minerals in the above-described tract outside the right of way is in the United States (Stip., par. 10, R. 6; Fdg. 6; R. 12, 13). In addition, the District Court found that respondent's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes (Fdg. 8, R. 13).

The District Court's memorandum opinion (R. 7–11) and its conclusions state that the 1862 Act granted

[1] The 1862 Act was amended by the Act of July 2, 1864, 13 Stat. 356, 358, in respects which do not affect the question here presented. Section 3 was amended to increase the outright grant of sections to 10 sections per mile instead of five on each side of the road, and to increase the belt on each side from which those sections could be selected to 20 miles instead of 10. It was further provided that "mineral land," as used in the 1862 Act, "shall not be construed to include coal and iron land."

to respondent "a fee simple determinable, sometimes called a base, qualified or limited fee" in the right of way and that this estate in the right of way is absolute and without restriction, except as to the implied condition of reverter, entitling the company to use it for any purpose which will not interfere with operation of the railroad, and to engage in mineral operations so long as they do not interfere with the primary purpose of the grant (Concls. 2, 5, R. 13, 14). Judgment in favor of respondent was entered by the District Court (R. 14–15), and the Court of Appeals, on the same theory, affirmed (R. 18–24).

SUMMARY OF ARGUMENT

I

A. The grant of a right of way in Section 2 of the 1862 Act "for the construction of" the railroad did not vest respondent with any interest in oil and gas deposits underlying the right of way. Congress undertook to supply two requisites to the establishment of the road, *i. e.*, (1) financial support in aid of construction and (2) a site and materials for the construction itself. The first objective was dealt with in Section 3 of the Act by the outright grant of lands in fee on each side of the right of way to be sold "in aid of construction," and in Section 5 providing for issuance of government bonds. The second objective, construction of the road itself, was the office of Section 2 granting (a) a right of way and (b) construction materials from adjacent lands, both grants being "for the construction" of the road. Under the settled rule of construction that "such grants must be con-

strued favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government," the grant of materials from adjacent land was only "for purposes of railroad construction, not as a means of business or of profit" and created rights in such materials only to the extent they were needed and used in construction. *Caldwell* v. *United States*, 250 U. S. 14, 20–21. Similarly, the grant of a right of way, also expressly "for the construction of" the road, was a grant of right of way only for those construction purposes; it granted no interest in the right of way "as a means of business or profit", and so excluded any grant of a right in the underlying oil and gas (which have no connection at all with railroading).

B. The conclusion that respondent acquired no right or interest in underlying oil and gas, clearly supported by construction of the 1862 Act alone, is fortified and confirmed by a firm federal policy—initiated in 1849 and recognized in decisions of this Court as being in full force in 1862 when the grant to respondent was made—of conveying mineral lands and resources only by laws specially dealing with them. Grants made after this policy was in force, if silent on the subject of minerals, were held by this Court not to include mineral lands. *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167; *United States* v. *Sweet*, 245 U. S. 563. Moreover, the 1862 Act specifically evidences that policy since it contains an express exclusion in Section 3 of mineral lands "from

the operation of this act," and the legislative history of the bill which became the Act shows that this express reservation was deliberate and strongly suggests that it was the intention of Congress to withhold from respondent any interest in mineral lands or minerals.

The only answer of the Court of Appeals to the impact of this policy is based upon a technical differentiation between a reservation of mineral lands from a grant and a reservation of minerals from lands granted, relying on *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669. But that case dealt only with "place lands"—holding that the administrative determination of non-mineralty at the time of patenting was conclusive—and recognizes an exception to the "non-mineral" policy of Congress because of other overriding considerations, *i. e.*, speedy availability and maximum marketability of such "place lands." Those overriding considerations are irrelevant as to right of way lands which were not to be sold or patented but were to be retained by the railroad for the construction and operation of its road.

II

A. The main reliance of the Court of Appeals is on a line of older decisions in which this Court referred to the railroad's interest in the right of way, in grants similar to respondent's, as a "limited fee." But those cases concerned private parties and none involved the question of rights in the right of way as between the United States and its grantees; and of

course none involved the question of title to oil and gas underlying the right of way. They therefore do not preclude an independent examination of that question in the instant case where it comes before the Court for the first time.

Moreover, we do not question the actual holdings in those cases. The rights asserted by the claiming third parties, if sustained, would have impaired the use of the right of way for railway purposes which the Government had granted, and the presumption was therefore in favor of the railroads. The right here asserted by the Government does not involve any impairment of the grant to respondent for railway purposes, and any doubts are to be resolved in favor of the United States.

The Court of Appeals also erred in declaring that this Court's decision in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, implied a recognition that the "limited fee" cases are dispositive of the question now before the Court. In *Great Northern* this Court (315 U. S. at p. 278) pointedly observed with regard to the "limited fee" cases that "None of the cases involved the problem of rights to subsurface oil and minerals," clearly intimating that those decisions do not foreclose a full examination of the question by this Court when, as here, it is squarely presented. And the Court of Appeals in its decision in *Great Northern* had flatly rejected that line of cases as authoritative on the question of ownership of minerals underlying rights of way. *MacDonald* v. *United States,* 119 F. 2d 821, 824 (C. A. 9). It is significant,

too, that in *Great Northern* this Court expressly held (p. 279) that where an examination of the statute, its legislative history, its administrative and legislative construction, all led to one conclusion, this Court would so hold despite a contrary view expressed in one of its previous decisions where such factors were not given due consideration.

The adverse decision in *United States* v. *Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill.), affirmed *per curiam*, 187 F. 2d 374 (C. A. 7), is erroneous because it fails to apply the proper rule of construction and is based upon a misapprehension of the scope of the "limited fee" decisions. In any event, it is clearly distinguishable since it involved a grant in 1850, when the mineral policy now relied upon by the United States had not matured, and the granting act contained no reservation on that subject. The lack of such a reservation was expressly relied on by the court in *Illinois Central* in deciding against the Government.

B. Finally, long and uniform administrative construction of grants such as is here involved, while not of course conclusive, is entitled to proper weight by the Court, as is a Congressional enactment in 1930 supporting and adopting such administrative interpretation. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275, 276.

ARGUMENT

I

THE GRANT BY SECTION 2 OF THE ACT OF JULY 1, 1862, OF A "RIGHT OF WAY THROUGH THE PUBLIC LANDS * * * FOR THE CONSTRUCTION OF" A RAILROAD AND TELEGRAPH LINE DID NOT VEST IN THE GRANTEE COMPANY ANY TITLE OR OTHER INTEREST IN OIL, GAS, OR OTHER MINERALS UNDERLYING THE RIGHT OF WAY

A. SECTION 2 OF THE ACT OF JULY 1, 1862, STANDING ALONE, CONVEYED NO RIGHT OR INTEREST IN MINERALS UNDERLYING THE RIGHT OF WAY

Section 2 of the Act of July 1, 1862 (*supra*, p. 2) is the basic statutory provision granting the respondent its right of way; the section provided that a "right of way through the public lands be, and the same is hereby, granted to * * * [respondent's predecessor in title] for the construction of said railroad and telegraph line." The first problem is the meaning of this section, standing alone.

(*a*). In considering the question of whether any interest in subsurface minerals passed under this grant, two settled rules of construction of Government grants come into play. They were stated by this Court in *Great Northern Ry Co.* v. *United States*, 315 U. S. 262, 272 (where the Court had before it the same question of title to subsurface minerals in a right of way, but under a different statute (see *infra*, pp. 41–45)), as follows: The language granting the right of way "is to be liberally construed to carry out its purposes," but "nothing passes but what is conveyed in clear and explicit language." Super-

ficially, these rules of construction may appear incompatible, since the first permits of some construction by implication while the second rules out of the grant anything not expressly conveyed; they do not, however, actually clash. The first is operative in considering whether a surface use of the right of way is a use for the objective for which the grant of the right of way was given, *i. e.*, railroad construction purposes. This means that the courts will approach with liberality the issue of whether a particular activity is within the scope of a true "railroad" purpose. But when the question is as to what is clearly not a "railroad" use, the second rule applies, and the grantee must be able to point to language in the grant expressly authorizing such conversion or disposal, or expressly granting the asserted right.[2]

The line of demarcation was strikingly drawn by this Court in *Caldwell* v. *United States*, 250 U. S. 14. Involved there was the General Right of Way Act of March 3, 1875, 43 U. S. C. 934; in addition to rights of way through the public lands, there was a grant to the owner of a right of way of the right "to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad." The grantee cut down trees for the making of railroad

[2] See *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 325–326; *Sioux City etc. Railroad* v. *United States*, 159 U. S. 349, 360; *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546.

ties. The "tie slash" or tops of the trees remaining were sold by the United States and the railroad company's agents sued the Government in the Court of Claims for the value of the tie slash. The Court, affirming a judgment of dismissal, stated (250 U. S. at pp. 20–21):

> The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that *such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government.* * * *
>
> The rule, it seems to us, is particularly applicable. *There was a grant of timber* by the Act of March 3, 1875, not of trees, *but of timber for purposes of railroad construction, not as a means of business or of profit;* nor could it be made an element, as contended, of compensation to the agents employed to cut it. [Emphasis added.]

(*b*). Accordingly, respondent must show (1) that the extraction of subsurface minerals is a use of the right of way in contemplation of the purpose of the grant or (2), failing this, that there is an express provision in the grant passing title to such minerals to the railroad company. Respondent cannot meet either requirement.

(1). It is clear that the extraction of oil, gas, or other minerals is not a use of the land for the stated purpose of the grant of the right of way. The

removal of the subsurface minerals cannot be labeled a use of the right of way "for the construction of said railroad and telegraph line," the objective expressed in Section 2. Thus, in the *Great Northern case* (315 U. S. at p. 272), the Court, referring to the General Right of Way Act there involved, stated:

> * * * The Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement. The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land and the underlying minerals; * * *.

Although that case involved a grant under a different statute, the language we have quoted squarely applies to the present question. For it is equally true of the grant to the Union Pacific of a right of way "for the construction of said railroad and telegraph line" that the grant does not include the right to remove subsurface minerals. Neither at the time of this grant nor at the present time can the removal of oil and gas be said to relate in any way to construction of a railroad.[3]

(2). As for the possibility that a grant may nevertheless be found in the explicit terms of Section 2, it is again important to take account of the particular purposes of Congress in making its grants in the 1862 Act. At that time the construction of a railroad presented two basic problems to those contemplating such

[3] There has been no claim by respondent or suggestion by the courts below that extraction of oil and gas was or could be related in any way to the "construction" of the railroad.

a project. One was the existence of financial resources to pay for its construction, and the other was the acquisition of such a right in the land between the termini of the road as would permit the laying of the tracks and the erection of necessary buildings. No private entity in 1862 had either, and by this Act Congress set up such a private corporation (respondent's predecessor) for the express purpose of building the road, and spelled out the assistance the Government was willing to render in meeting the two related, yet distinct, needs of financial wherewithal for construction costs and of a physical situs for the location of the tracks and necessary appurtenances. The two objectives were to be obtained by different provisions of the Act.

Financial aid was the office of Section 3 (*supra*, pp. 2–3), which granted alternate odd-numbered sections of public land to the extent of five sections (increased in 1864 to ten sections, *supra*, p. 5, fn. 1) per mile on each side of the road. This grant was not "for the construction" of the road (as was the grant of the right of way in Section 2), but "for the purpose of aiding in the construction of" the road. That the land so granted was for the purpose of furnishing the required capital, through subsequent sale of such lands by the company, is clear from the final provision of Section 3 that "all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per

acre, to be paid to said company." In other words, while the road was under construction the company could realize any price the market would bring, but three years after completion of the entire road a settler could buy the land for the ordinary ceiling of $1.25 per acre.

It is also to be noted that, on the theory that the original outright grant of five sections per mile on each side of the road might not afford sufficient capital, supplementary aid was embodied in Section 5 of the Act which provided that, upon completion of each consecutive forty miles of the road, United States bonds of an aggregate value of $16,000 per mile should issue to the company, the company being required by Section 6 to pay such bonds on the maturity date (thirty years after issuance). And, as already noted (*supra*, p. 5, fn. 1), when still additional financial aid was deemed necessary, this was done by doubling the grant of "place lands."

The second aspect of the problem, furnishing a right in land for the physical location of the road, was dealt with in Section 2 of the Act, the provision here in question. That section (*supra*, p. 2) provided that "the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line" and further provided that "the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof." These two grants, of

a right of way in certain public lands and of construction materials existing on adjacent lands, were clearly granted only for purposes of construction and not as a source of revenue. The grants in Section 2 are in each case "for the construction" of the road, not "for the purpose of aiding in the construction of said railroad," the stated purpose of the outright grant of "place lands" in Section 3, just discussed.

Furthermore, the grant of the right to take "earth, stone, timber, and other materials" from lands adjacent to the line of the road is practically identical with the provision of the General Right of Way Act considered by this Court in *Caldwell* v. *United States,* 250 U. S. 14, and was for the same purpose. See *supra,* pp. 12–13. The grant of such materials in Section 2 was therefore only to the extent that they were necessary to the construction of the road and was not a grant "as a means of business or of profit" to the company (250 U. S. at pp. 20–21). Similarly, the grant of the right of way itself, which was also specifically "for the construction of said railroad and telegraph line," was limited to "construction" requirements and was not a grant to respondent "as a means of business or of profit." There would thus be no grant of any interest in oil or gas underlying the right of way since use of those materials—like the tree remnants involved in *Caldwell*—would be purely for purposes of business or profit.

(*c*). In summary, the Government submits that while the grant of the right of way in Section 2 is to be liberally construed to effectuate its purposes,

this rule of liberal construction cannot be employed in order to vest rights in the company above, beyond, and entirely unrelated to the purpose of the grant. That rule is completely satisfied, and every legitimate railroad purpose is served, if the company's rights are confined to surface use of the right of way and so much below the surface as is necessary for support. The removal and conversion of minerals underlying the right of way, for profit, is outside the objective of the grant of the right of way, and the rule of strict construction applies. Respondent can point to nothing in the 1862 Act, in Section 2 or elsewhere, which expressly provides or even implies that Congress intended to vest mineral rights in the right of way in the grantee. On the contrary, the terms and purposes of Section 2—even if considered alone, without reference to the rest of the Act and the general policy of Congress at that time—show that no such grant of mineral rights was made.

B. THE FEDERAL POLICY OF CONVEYING MINERALS ONLY BY EXPRESS GRANT, IN EFFECT AT THE TIME OF AND EMBODIED IN THE GRANT, CONFIRMS THE VIEW THAT MINERALS UNDERLYING THE RIGHT OF WAY WERE NOT INCLUDED IN THE GRANT

We have just shown (Point I, A, pp. 11–18, *supra*) that, given its proper construction, the language of Section 2 of the 1862 Act containing the right of way grant, standing by itself, leads to the conclusion that subsurface minerals in the right of way did not pass to the railroad. This result need not rest on that section alone, however; it is confirmed by the statute as a whole when read in the light of the settled federal

policy, in effect at the time of the grant, of excepting minerals unless they were specifically conveyed.

This Court said in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 273, that the General Right of Way Act of 1875 "was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' " There, the Court based its decision on a change of policy under which the Government ceased making land grants and substituted grants of a right of way only, rejecting an argument based on the identity of language in the grant of right of way in the 1875 Act and the prior so-called "limited fee" grants. A still earlier change of federal policy in making grants of all kinds comes into play here. The Union Pacific Act was also the product of its period, and the "history of the times" when that Act was passed, bearing on the question here presented, has already been documented by decisions of this Court.

1. The grant to respondent was made in 1862, and in the twelve years preceding it federal policy with respect to mineral lands had completely changed. Prior to 1849, no distinction was made between mineral lands and agricultural lands in federal grants, and such grants passed the one as readily as the other. But Congressional concern about minerals underlying the public domain was generated by the gold strike in California. Thus, when Congress extended the land laws of the United States to the public lands of California, it provided in Section 6 of the Act of March 3, 1853, 10 Stat. 244, that:

> * * * all the public lands in the State of California * * * with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State * * * and excepting also * * * the mineral lands, shall be subject to the preëmption laws of the fourth September, eighteen hundred and forty-one * * * and shall * * * be offered for sale * * * under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed * * *.

This Act, although limited to California, established a policy—which, as we will show, was later generally adopted—of disposing of minerals only by statutes expressly dealing with minerals. It will be noted that the only specific exception of mineral lands contained in Section 6 of the 1853 statute, quoted above, was their exclusion from the operation of the pre-emption laws, and that the grant to the State of sections sixteen and thirty-six contained no such exception. In *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, the question was squarely presented whether the grant to the State of those two sections included such lands if they were mineral. This Court reasoned, on the basis of the exception of mineral lands from the pre-emption laws and express exceptions of mineral lands granted to the State in other provisions of the Act, that the statute fixed a definite policy, so far as California was concerned, of withholding mineral lands, and that the grant to the State of sections sixteen and thirty-six, *although not containing an express reservation of mineral lands,* nevertheless did not include them.

In the course of its decision, rendered in 1880, the Court set forth the development of federal policy with regard to mineral lands generally. It pointed out (102 U. S. at pp. 172–173) that prior to 1850, when California was organized, the territory which later became the State was found to be rich in minerals, and that this gave rise to conflicting views among American statesmen as to what long-range general policy with regard to mineral lands was to be adopted, and that the question was finally settled in 1866 by the Act of July 26, 1866, 14 Stat. 251, prescribing a special method by which mineral lands could be acquired. The Court characterized the statute (p. 174) as "so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

Of the period intervening between 1849 and 1866, the Court stated (102 U. S., pp. 173–174):

> During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and *in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied.* This distinction is nowhere more plainly manifested than in this act of 1853. * * *
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> * * * so careful was Congress to protect mineral lands from sale and pre-emption, that,

as we have already shown by the proviso to sect. 3 of the act, the surveyors were forbidden to extend their surveys over them.

The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise. [Emphasis added.]

Likewise, a grant to the State of Utah in 1894 of sections two, sixteen, thirty-two and thirty-six, which did not contain an express reservation of mineral lands, was nevertheless held to be limited to non-mineral lands. *United States* v. *Sweet*, 245 U. S. 563. The Court first observed that the grant neither expressly included mineral lands nor expressly excluded them, and that if it did either there would be no question. But since the grant did not mention mineral lands the Court found it "essential to inquire whether the congressional will is otherwise made manifest, that is to say, whether the general words of the grant are to be read in the light of other statutes and a settled policy in respect of mineral lands" (245 U. S. 563,

567). Using this measuring rod, the Court held that, since the settled policy had been adopted by the Government, prior to 1894, of disposing of mineral lands only under laws specially including them, the subsequent grant in 1894 after that policy was established did not include mineral lands.

Thus, the Court has clearly recognized that, after the establishment of the federal policy of reserving mineral lands for disposition only under laws specifically providing for them, any "open" grants—grants neither reserving nor conveying mineral rights—should be read as not including them.[4]

2. The grant to the Union Pacific in 1862 must be read in the light of this policy, because it is beyond question that that policy, well developed by this time, was in the mind of the Congress when it passed the statute under which respondent claims. For instance, Section 3 of the Act, which provided for grants of alternate sections in fee to be sold by the company, contained an express exception of mineral lands from the operation of the Act. Moreover, while a general statutory method for acquisition of mineral lands was not enacted until 1866 (see *supra*, p. 21), this Court has made it clear that the policy of excepting mineral lands from grants under other laws was firmly established by 1862. In *United States* v. *Sweet*, 245 U. S. 563, 569, the Court cited a number of instances where Congress had expressly excepted mineral lands from

[4] An extensive discussion of this special minerals policy it contained in *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582 (C. A. D. C.), certiorari denied, 347 U. S. 989.

its grants, including the reservation of mineral lands from this grant to Union Pacific, and said of them that "these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them * * * ". That these restricted grants were but examples of a general and fixed policy regarding minerals had also been noted in the much earlier decision in *Barden* v. *Northern Pacific Railroad,* 154 U. S. 288, 317.[5]

The legislative history of the Union Pacific Act confirms this view. While the bill was under consideration in the House (H. R. 364, 37th Cong., 2d Sess.), one member became exercised by the probability that "place lands" to be acquired by the company in fee, thought to be non-mineral when patented, would later turn out to be valuable mineral land. To protect the Government's rights he proposed an amendment which would have subjected such lands, after conveyance by the Government, to mineral entry by third

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[5] The statute here involved embodied the first *express* implementation with respect to railroad grants of the new policy as to minerals. (The policy had earlier been made effective with respect to other types of grants.) The withdrawal of minerals was also the first step in a general program of retrenchment in railroad grants which, as hereafter developed (*infra*, pp. 41–45), finally resulted in legislation granting to such companies nothing beyond a mere right of way easement. The policy thus initiated in 1862 (with respect to railroad grants) was reflected within three years in the Act of January 30, 1865, 13 Stat. 567, in which the 38th Congress provided that no act passed at its first session to aid in the construction of roads "shall be so construed as to embrace mineral lands." *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 312.

parties, the owners of the lands to be compensated by such parties for any injury to the lands by reason of exploratory and mining operations. This proposal was understandably and properly rejected, it being pointed out that the amendment "proposes to allow the public to enter upon the lands of any man, whether they be mineral lands or not" and that "the man who * * * commits the injuries may be utterly insolvent, not able to pay a dollar." The objection to the amendment was not grounded on consideration of the interest of the railroad company, but upon concern for those to whom the railroad company had to sell the granted "place lands," or those settlers who might pre-empt land unsold by the railroad. Although the amendment was rejected, the Congress was given this assurance (Congressional Globe, 37th Cong., 2d sess., Pt. 2, pp. 1909–1910):

> The mineral lands through which this road is to pass are already excepted in this bill from the lands granted to this company. They will still belong to the Government of the United States. * * *

No distinction was made, it should be noted, between "place" mineral lands and minerals under the right of way. Indeed, the statement underlines the strong intention of Congress that mineral resources were not knowingly to be given to the railroad.[6]

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[6] It was also stated in the Senate that "all mineral lands are excluded from the operation of this act, and in their stead a like quantity of unoccupied and unappropriated agricultural lands nearest to the line of the road may be selected in alternate sections." Cong. Globe, 37th Cong., 2d Sess., Pt. 3, p. 2814.

There is additional evidence that the Congress which passed the statute did not intend to endow the company with any mineral riches. As it passed the House, the exception of mineral lands in Section 3 read: "*Provided,* That all mineral lands shall be exempted from the operation of this *section*" [Emphasis added]. An amendment striking out the word "section", and inserting in lieu thereof the word "act," was offered in the Senate, and accepted by that body without question, as well as by the House. Cong. Globe, 37th Cong., 2d Sess., Pt. 3, p. 2756. See *supra*, p. 3. While this amendment, if applied literally to the right of way grant, might have made it impossible to construct the road, because few if any, routes were possible which wholly avoided mineral lands,[7] the change from "section" to "act" does tend to show that Congress was not content with merely withholding mineral lands from the "place" grant, but that it intended to bar the railroad from obtaining mineral deposits under any provision of the Act, including Section 2 granting the right of way.

3. The only basis given by the Court of Appeals for failure to apply the Congressional mineral policy here is the argument that there is a difference between a reservation of mineral lands from a grant and a reservation of minerals in lands granted (R. 23). As

[7] As pointed out below (*infra*, p. 30), the proviso can be given full effect in the right of way, in accord both with the proviso's purpose and with the objective of the grant of the right of way, by holding that with respect to the right of way the proviso excepts underlying mineral rights but not the surface area.

we understand it, the theory is that since the only reservation in the Act was of mineral lands (as a whole) in Section 3, there was necessarily no reservation of minerals from lands granted for the right of way under Section 2.

Our first answer is that the Court of Appeals is in effect relieving respondent of the burden of showing affirmatively that the grant of the right of way included minerals, and instead is saddling the Government with the converse burden of proving an express reservation of minerals, in total violation of the rule of construction we have shown to be applicable (*supra,* pp. 11 *ff*) as well as of the special minerals policy Congress adopted (*supra,* pp. 19 *ff*).

Secondly, the Court of Appeals erroneously calls upon *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, to support its view. That case did not involve any question as to mineral rights under a right of way. It related to "place lands" such as were granted outright by Section 3 of the 1862 Act, and held that, when the railroad qualified to receive patents for "place lands" and selected such lands, the statute contemplated that a conclusive administrative determination of the character of the lands as mineral, and hence non-patentable, or as agricultural and subject to patent, had to be made. The Court held that a patent must issue on the one basis or be refused on the other; that such a determination could not be avoided or kept open for the future by the action of government officers in including in the patent an exception of "all mineral lands should any such be found in the tracts

aforesaid"; and that such an exception was unauthorized by the statute.

As we have pointed out (*supra*, pp. 14 *ff*), the grant of non-mineral "place lands" by Section 3 is entirely distinct from the grant of right of way in Section 2 here involved, and was for an entirely different purpose. The "place land" grant, to be implemented by issuance of patents under Section 4 of the Act (*supra*, p. 3) periodically at the completion of each 40 miles of road, was for the end of maintaining the company in such financial status as would enable it to continue the work of further extending the construction of the road until its completion.

Speedy administrative determination of the character of the lands once selected, as mineral or non-mineral, followed by their early patenting if found to be non-mineral, was essential to insure their ready availability for sale as a source of financial aid to the company. Similarly, maximum marketability of the title to be conveyed by the patents authorized was likewise necessary to ready realization of the financial assistance intended to be given the company. Hence, a patent with no strings attached was held in the *Burke* case to be required. This is merely another illustration of the rule of liberal construction to accomplish the purposes of the grant—in this instance, the financing of the railroad. See *supra*, pp. 11–12. That mineral lands might be patented through mistake or lack of knowledge meant only that the grantee acquired them, not as mineral lands, but, due to ignorance of their true character, as agricultural lands.

The holding in *Burke* is that, based upon considerations peculiar to the objectives of the "place land" grant, Congress limited the extent to which its intention not to pass mineral wealth could be safeguarded by the administrative officers. The Court was not announcing the principle, in effect applied against the Government in this case, that the railroad gets anything not expressly reserved. Rather, upon factors special to the "place land" grant, the Court found in the statute an affirmative intention on the part of Congress, under certain conditions, that the railroad acquire by patent an absolute fee simple.[8]

When it comes to the right of way grant, none of the elements characteristic of the "place land" grant

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[8] For similar reasons it is likewise irrelevant that, as noted by the Court of Appeals (R. 23), the homestead and other general land laws authorizing acquisition of public lands contained a reservation of mineral lands rather than a reservation of minerals. Those laws also contemplated and required the issuance of patents when their requirements were met by settlers, just as in the "place land" grant to respondent. And for the reasons given in the text, the fact that, through ignorance of the real character of mineral lands, patents might issue for such lands on the theory that they were non-mineral, does not qualify the obvious purpose of Congress not to part *knowingly* with minerals even under those laws. Equally irrelevant is the circumstance, also noted by the court below, that it was in the Stock-raising Homestead Law of 1916, 43 U. S. C. 291, that Congress first provided for issuance of patents with a reservation of minerals. This shows, not that the mineral policy we rely on did not exist, but rather an intention to eliminate the loophole through which the policy had been partially frustrated under prior laws where patents were required to issue. This later historical development has no tendency to establish that Congress in 1862 intended to give respondent the minerals under the right of way lands. No patents were ever to issue for such lands and thus as to those lands no loophole had ever existed.

involved in the *Burke* case are present, and respondent cannot assert, in view of the "limited fee" causes (discussed *infra*, pp. 32 *ff*), that it was ever to receive an absolute fee in the right of way lands. The right of way lands were never to be a source of profit to the respondent through sale; they were never to be granted outright to the company; no patents for the lands were to be issued; and the grant of such land was for a specific purpose "which negated the existence of the power to voluntarily alienate the right of way or any portion thereof." *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271. See the discussion, *supra*, pp. 13 *ff*. Hence, there was no need for a requirement that the lands constituting the right of way should be classified by government officers, at any particular time, as mineral or non-mineral. In other words, the question decided in *Burke* does not and cannot arise with respect to right of way lands. With respect to "place lands," Congress had to resolve a conflict between its policy not to grant minerals and the considerations of ready marketability applicable to land to be sold by the railroad. No such conflict could occur as to the right of way, and there was no need or justification for nullifying or restricting that mineral policy to the advantage of respondent.[9]

[9] Moreover, as we have mentioned (*supra*, p. 26), lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line. Instead, the minerals policy could be and was effectuated, not by excepting the total surface area, but rather by withholding the minerals in the land constituting the right of way. The "mineral lands" proviso in Section 3 can and does operate in that fashion in the right of way.

II

THE DECISIONS RELIED UPON BY RESPONDENT DO NOT, WHEN PROPERLY INTERPRETED, SUPPORT THE JUDGMENT BELOW

Thus far, we have undertaken to show that, if the grant of the right of way is given a fair and proper construction, title to the underlying minerals was not intended by Congress to pass to the respondent. If that position is sound, there is no need to consider the precise nature of the title or interest of the company in the right of way in terms of dictionary or conveyancing categories. Whatever label be applied to the company's interest—"limited fee" or "easement" or something else—that interest in any event did not include the minerals underlying the right of way.

However, the trial court's theory of decision, as we have noted (*supra,* pp. 5–6), was that the railroad company's grant vested it with a "limited fee" in the right of way lands, subject only to the requirement that it build and continue to operate the road; that no other limitations upon the grant existed; and thus that the company could remove the oil and gas. This real property conveyancing approach was also the primary ground of decision of the Court of Appeals; its opinion (R. 19) shows that its conclusion that the railroad acquired a "limited fee" in the right of way—entitling it to remove the underlying minerals—was based upon certain decisions of this Court, some of which had been noted but not deemed controlling by the trial court (R. 9–10).

In this Point, we shall meet the rulings below on their own ground and show that those decisions do not justify a holding that the respondent railroad, under the grant of right of way, ever acquired title to the underlying oil and gas.

A. PRIOR DECISIONS DO NOT PRECLUDE A HOLDING THAT UNDER ITS GRANT THE RESPONDENT ACQUIRED NO INTEREST IN THE MINERALS BENEATH THE RIGHT OF WAY

The trial court observed (R. 8) that "It would seem that the particular issue here to be resolved heads into virgin legal territory, as counsel seem to agree that there are no cases which form a precedent as being on all fours with the case at bar." The Court of Appeals also conceded that no previous decision is squarely in point (R. 21): "It is urged [by the Government] that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true."

Since the cases relied upon by the courts below and by respondent did not involve the question of whether the Government passed title to the minerals underlying the right of way, the only problem is whether, by implication or otherwise, these prior decisions counsel this Court, now reaching the precise issue for the first time, against a completely independent examination and decision of the question *de novo*. We say they do not.

1. *The "limited fee" decisions*

The Court of Appeals cited (R. 19) seven decisions of this Court in support of its conclusion that the

respondent acquired a limited fee in the right of way lands. In none of them, save *Clairmont* v. *United States,* 225 U. S. 551, was the United States a party, and this fact alone suffices to show that the question of the title of the United States to oil and gas underlying a right of way, vis-a-vis its grantee railroad company, was not involved. Nor was any such question involved in the *Clairmont* case.[10]

Of this Court's prior decisions cited by the court below, the leading case is *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267. The only question there was whether third parties could make valid homestead entries upon portions of the right of way after the railroad company had located its right of way and laid its tracks. In the first paragraph of the opinion (p. 270), the Court stated that, upon the railroad's having complied with the Act, "the land forming the right of way therein was taken out of the category of public lands subject to preëmption and sale, and land department was therefore without authority to convey rights therein" to third parties. It was in answering an argument that title had vested in the trespassers by adverse possession that the Court stated that the company had a limited fee in the right of

[10] The *Clairmont* case is irrelevant. That was a criminal proceeding and the question was whether the defendant, found to be transporting liquor on a train at a point where the railroad's right of way passed through an Indian reservation, had violated federal laws regarding introduction of liquor into "Indian Country." It was held that the right of way was not Indian Country because, following the grant of the right of way by the United States to the railroad, the Indians had ceded all of their right and title to the right of way strip to the United States.

way. We suggest that it was hardly necessary to reach the question of the precise nature of the railroad's interest in the right of way, since it could not be maintained on any reasonable ground that an Act which put the right of way beyond the power of disposal of the Government's land officers nevertheless permitted a divesting of the railroad's rights by any other means.

In any event, the statement that the grant "was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" does not, of itself, have any real bearing on the question now here. As we have noted, ownership of the minerals was not involved, and the Court therefore had no occasion to examine the grant from that standpoint. There is nothing in the case which precludes the Court from now holding that the company's "limited fee" in the right of way does not embrace ownership of the minerals to use them for its profit. The term "limited fee" does not necessarily include a conveyance of underlying minerals. Cf. *Los Angeles & Salt Lake Railroad Co.* v. *United States*, 140 F. 2d 436 (C. A. 9), certiorari denied, 322 U. S. 757.[11] And it should be noted, in connection with our

[11] See *United States v. Big Horn Land and Cattle Co.*, 17 F. 2d 357, 365 (C. A. 8) (indicating that a "limited fee" can be "in the nature of an easement"). It is always a question of the true intention and purpose of the grantor. In this case, what was granted respondent is a matter of federal law, and, as we have shown, it was the intention of Congress not to grant minerals underlying the right of way. In this connection,

argument in Point I (*supra*, pp. 14 *ff*), that in the *Townsend* decision the Court also said (190 U. S. at p. 271) that the grant of the right of way "was explicitly stated to be *for a designated purpose*, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof" (emphasis added). See also *infra*, pp. 48 *ff*.

Even weaker are the decisions in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, and *St. Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426. In the first, the only question was whether a federal statute which exempted a railroad right of way from state taxation operated to confer an exemption on fixed improvements erected on the right of way, such as station houses. Here again, we suggest that it is questionable whether an answer to this problem required the Court to reach the issue of the railroad's interest, since the improvements became in law a part of the right of way itself, and it could well have been held that such improvements were in contemplation when the granting Act was passed, regardless of what the interest of the company might be.

Moreover, that ruling was premised on the initial proposition that Congress, by restricting the railroad to a precise route across public lands and of a prescribed width, had invested the company with some-

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resort cannot be had to the incidents and nature of a private grant under local law to determine the nature of the federal grant, for resort to state law cannot be allowed to overturn the purpose of Congress. See *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 270–271. See also the discussion, *infra*, pp. 47–48.

thing more than a mere right of passage. But the physical limitations imposed by Congress do not have the slightest tendency to indicate that Congress intended to convey minerals. As a practical matter it was of course known in advance that the road would not run over one route one day and over a different route the next, and the width limitation reflected an intention to give to the road a right of way sufficient for construction and operation of the railroad, and no more. Confinement of the right of way to a definite route through the public lands also functioned to identify the "place lands" to be granted to the company for sale and to fix the belts from which such lands might be selected. It is anomalous to suppose that this insistence by Congress on narrowing the area of the right of way furnishes a basis for implying that Congress intended to broaden the estate conveyed so as to vest the company with the minerals. And, as in the *Northern Pacific* case, *supra*, the Court's passing characterization of the company's interest in the right of way (172 U. S. at p. 183) as "more than an ordinary easement" was not given with any question as to minerals in mind.

St. Joseph & Denver City R. R. Co. v. *Baldwin*, 103 U. S. 426, *supra*, presented only the issue of whether third parties, after the line of the railroad had been fixed in accordance with the statute granting the right of way, could acquire title to lands later found to be part of that right of way. The Court pointed out (p. 430) that "If the company could be compelled to purchase its way over any section that might be

occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road." Once again, the ruling might have rested upon this fact alone, since such a result could hardly have been contemplated in making the grant. This, too, is simply another application of the principle of liberal construction of the grant in order to effectuate its purpose (see *supra*, pp. 11–12).

In any event, in this case as in the others, the Court had no occasion to consider the question of whether minerals were reserved and this problem was not in any way before the Court. Its reference to the right of way grant as "a grant in praesenti" and as "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed" by no means precludes this Court from holding that the minerals were excepted from the grant.

The same is true of the other cases cited by the Court of Appeals—the Government was not a party and its title to the minerals was not in question and not under consideration in any of them. In *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, there was a contest between the railroad and a private citizen who claimed land forming a part of the right of way under a patent from the State of Kansas, the contention being that the disputed part had belonged to the State as part of a school-land grant. This Court held that the original claim of the State to Sections 16 and 36 as school lands was rejected by Congress and abandoned by the State, and that the Gov-

ernment in 1866, when it granted the right of way, was free to dispose of such lands. It is true that, in discussing the grant to the railroad, the Court stated (p. 116) that the right of way "was granted to the company unconditionally" and that the United States had the right "to grant absolutely the fee of the two hundred feet as a right of way to the company" and that (p. 117) "That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration." But here too the rights of the Government vis-a-vis the railroad were not in contemplation, and the Court's expressions were merely part of its holding that the Government could, in making the grant to the railroad, extinguish the Indian title and intended to do so.[12]

Similarly, in *M., K. & T. Ry.* v. *Oklahoma*, 271 U. S. 303, the question was the validity of a contract between the railroad and a city granting the latter a right of way to construct a street under the railroad right of way. As to the company's right to make the contract, it was simply stated (p. 308) that "The company owned its right of way lands * * * in fee," citing the *M., K. & T.* case just discussed. In this case, as in the others, there was no real construction of the grant from the standpoint of the rights granted the railroad on the one hand and retained by the Government on the other in the right of way lands or the minerals

[12] One of the issues discussed by the Court was whether the United States had the right to dispose of certain lands in an Indian reservation.

underlying them. We may add that the declaration in the first of these two *M., K. & T. Ry.* cases, if its language is taken out of context, that the grantee acquired an "absolute" fee or fee simple was overturned by the subsequent decision in the *Townsend* case, 190 U. S. 267 (*supra*, p. 33).

Finally, the remaining case cited by the Court of Appeals, *Union Pacific R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, while it involved the right of way here in question, was another contest to which the Government was not a party and in which its rights were not being adjudicated or even considered. The controversy was between the railroad company and a private individual who claimed title by adverse possession. The holding was that a federal statute making state statutes of limitation applicable was not retroactive and did not apply to adverse possession prior to its enactment; and that a sufficient time after the act became operative had not elapsed to establish such a title. It is true that the Court stated (p. 198) that "It is established that the right of way to the several railroads was a present absolute grant, subject to no conditions except those necessarily implied, such as that the roads should be constructed and used." But here again there is no detailed analysis of the grant essential to a decision of the present question, any more than in the cases previously discussed.

We have no quarrel with these "limited fee" cases so far as they actually go. They did not involve the issue now before the Court, and the question in this case is not whether they should be overruled but

rather whether they should be extended, as the Court of Appeals has done, to govern the interest and title of the United States in the underlying minerals. While those decisions characterized grants of right of way as "limited fees", they did not embody an analysis of the grants from the viewpoint of the United States such as we have made (*supra*, pp. 11 *ff*), and which, we submit, the Court should consider in passing for the first time on the title of the United States to the underlying oil and gas.[18] Specifically, there was no examination of the precise purposes of the grants and no consideration of the shift in federal policy as to minerals and its express implementation in the various granting acts. But, as we have pointed out, the *holdings* themselves were proper on the principles we believe correct. The interests in the rights of way asserted by third parties against the railroads were generally, as in *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, claims which would, if sustained, deprive the railroad of *all* rights in portions of a right

[18] The situation is similar to one before this Court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288. That case involved "place lands" rather than right of way lands, and the question was whether the railroad was entitled to patents to lands which, after the company had qualified by meeting the building requirements, but before issue of patents, were found to be mineral lands. In discussing two previous decisions relied on as controlling by the railroad, and which this Court refused to extend, the Court stated (p. 315): "In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant."

of way given by Congress for railroad purposes. In *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, New Mexico's claimed right to tax, in the face of a Congressional exemption, would, if upheld, have conditioned the railroad's continued operation of the road upon a payment of money to the State. In these situations, doubts were properly resolved in favor of the railroad.

If, as in such cases, the "limited fee" doctrine is confined to a holding that the railroads received a "limited fee" in the surface of the right of way and so much below the surface as is necessary for physical support, every legitimate interest and railroad construction purpose contemplated by the grant is served. But in the instant case the right asserted by the United States in no way impairs the efficacy of the grant of right of way to respondent, nor does it prejudice respondent's full use of the right of way for the railroad purposes for which the Government granted it. Accordingly, the "limited fee" principle is inapplicable here, and the Court should neither be controlled nor influenced by the broad and general statements found in these opinions. See *United States* v. *California*, 332 U. S. 19, 36–39.

2. *The Great Northern decision*

While, as we have noted (*supra*, p. 32), the Court of Appeals readily acknowledged that the question now before this Court was not involved in any of the "limited fee" cases, that court (R. 21–22) read the decision in *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, as sustaining the railroad's right to

minerals under any grant prior to 1871 (R. 22). The court flatly stated (R. 22), with reference to *Great Northern*, that "no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals." This, we submit, is an incorrect extension of this Court's decision, unwarranted either by its holding or the opinion.

The *Great Northern* case did not involve a grant of right of way under a land-grant statute such as we have here. That railroad company had a right of way grant under the General Right of Way Act of March 3, 1875, 18 Stat. 482. That Act, of general application, provided for the acquisition of rights of way through the public lands, unaccompanied by any grant of lands in fee to aid in financing the railroad. The company argued that the language of the right of way grant was in substance the same as the grants of right of way in the line of "limited fee" cases just discussed (*supra*, pp. 32–41), and contended that on the basis of those decisions the railroad acquired the minerals underlying the right of way. The Government, while not conceding that this line of decisions brought about that result, properly relied primarily on the differences between the 1875 Act and the prior land-grant acts, and on a well-documented history of a policy of discontinuing the financing of roads largely at public expense, a policy progressively embodied in special acts prior to 1875 and resulting in the enactment of the general 1875 Act granting rights of way only.

This Court accepted the Government's position and, accordingly did not pass upon the relevance of the "limited fee" cases, stating (p. 278) that they "deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871."

The Court did, however, reject the view of *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47, and dicta in two later cases, which applied the "limited fee" cases to an 1875 Act case. It did so on the ground that the *Stringham* conclusion did not take account of the change of congressional policy between 1871 and 1875 and was "inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling." For precisely the same reasons, we say that the change of congressional mineral policy between 1849 and 1862, the language of the 1862 Act, its legislative history and its legislative and administrative construction, rather than the decisions in the "limited fee" cases, control this case.

The *Great Northern* opinion did say regarding the "limited fee" decisions (315 U. S. p. 278): "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." This suggests perhaps that the holdings in this series of cases turned not so much upon the language of the right of way grants as upon the fact that, apart from the right of way, the grantees were being

given tremendous acreages outright, characterized as "lavish grants" (p. 273).[14] If this be an accurate explanation of the basis of the "limited fee" decisions, they are certainly irrelevant here because other considerations and other policies of the Government come into play as to the mineral question.[15] The grant of the right of way and the grant of "place lands" were, as we have already noted (*supra*, pp. 14 *ff*), two distinct grants for differing purposes. Though Congress may perhaps have erred in too lavishly dispensing non-mineral "place lands," or in overestimating the amount of subsidy needed to construct the road, that fact has, we think, no bearing on the construction of the right of way grant other than to emphasize that minerals were not intended to pass under any section of the Act since they were indisputedly excluded from the lavish "place" grants. And if Congress was too liberal in dispensing "place lands," from which Congress excluded mineral lands, we submit that the error should not be compounded by this Court's enlarging the holdings in the earlier cases to include minerals underlying the right of way.

That this Court was not, as the Court of Appeals erroneously concluded, agreeing that the "limited fee" decisions in effect decided the question now before the

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[14] The Court also said (315 U. S. at p. 273, fn. 6): "In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees."

[15] It is significant that, in these "limited fee" decisions, there is no reference to the special mineral policies of Congress (*supra*, pp. 32–41).

Court is, we believe, also demonstrated by the statement in *Great Northern* (315 U. S. at p. 278) that "None of the [limited fee] cases involved the problem of rights to subsurface oil and minerals." This observation was made in the light of a more explicit rejection by the Court of Appeals, in its ruling in *Great Northern*, of the "limited fee" decisions as controlling on the issue of title to the underlying minerals. The case was styled in the Court of Appeals as *MacDonald* v. *United States*, 119 F. 2d 821 (C. A. 9), and that court, replying to the argument that these "limited fee" decisions disposed of the issue of title to minerals underlying the rights of way, stated (p. 824):

> * * * It would serve no useful purpose to undertake here a statement of the facts of these cases or of the way in which the question of title arose; enough to say that in none of them was the court confronted with the question of the ownership of underlying minerals. We do not believe the holdings are decisive of that question. So far, however, as concerns the surface area embraced in the federal right of way grants, it may be taken as settled that the title of the railroads is the equivalent of a fee, limited only by the possibility of reverter.

3. *The Illinois Central litigation*

Both courts below also regarded (R. 9, 22) *United States* v. *Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill.), affirmed, 187 F. 2d 374 (C. A. 7), as supporting the conclusion that title to the minerals passed to respondent. That case likewise involved the question

of whether the company or the United States owned the oil underlying the company's right of way. The railroad's rights stemmed from the Act of September 20, 1850, 9 Stat. 466, which made a grant to the State of Illinois similar to that here involved, but with important differences. While the section granting the right of way was substantially the same as in the instant case, there was no express reservation of mineral lands from the operation of the Act nor any indication that Congress intended to reserve minerals. The State conveyed its rights to the railroad company "in fee simple."

In arriving at the conclusion that minerals passed to the company, the trial court held, on the authority of *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267, discussed above (*supra,* p. 33), that the company had a "limited fee" in the right of way, that the incidents of such a grant were to be determined by Illinois law, and that under that law the railroad could make any use of the right of way which did not interfere with operation of the road, and so could extract the minerals. The trial court stressed the absence of any language in the granting statute reserving mineral lands, and stated (89 F. Supp. p. 24): "It is believed that had an intent to reserve the minerals existed it would have been expressed as was the practice of Congress during the period *preceding 1871* in making grants in which mineral lands and mineral rights were withheld." [Emphasis added.] The Seventh Circuit, in a *per curiam* opinion, affirmed on the reasoning of the trial court, but appears to have been impressed by the circumstance

that the deed from the state to the company purported to convey a fee simple interest in both the right of way and the "place lands."

Our observations on this case are threefold. First, it is clearly distinguishable. The grant to Illinois was made in 1850, at a time when the federal policy of withholding minerals had not been developed (see *supra*, pp. 19–23), and the Act contained no express indication that Congress intended to withhold minerals or was at all concerned about them. The very elements which the District Court found lacking in the Illinois grant and which presumably would have led that court to a contrary conclusion, are, as we have demonstrated, present in this case. Second, the decision is erroneous because the grant of right of way there involved, standing alone, did not pass minerals under the applicable rules of construction we have discussed (Point I, A, *supra*, pp. 11 *ff*) and because the court misconceived the meaning of the "limited fee" cases.

Third, as to the suggestion by the Seventh Circuit that state law controls the nature of the railroad's interest, we point out, initially, that in the present case the grants were directly to the railroad and not through the conduit of a state. Moreover, we submit that, since the intent of Congress to reserve minerals from the grant in this case is so evident, it is unthinkable that Congress nevertheless intended that its objective might be defeated by construction of the grant under state laws. The road was to pass through a number of states, not all of which had been organized in 1862, and it is unlikely that Congress con-

templated that the Government's retention of minerals should be effective in one state and not in another, according to local law. While it has been stated in private suits that federal grants will be construed without reference to local law, but that the incidents of a federal grant may be determined by such law (*Northern Pacific Ry.* v. *Townsend,* 190 U. S. 207, 270; *Packer* v. *Bird,* 137 U. S. 661, 669), it seems clear that local law can have no bearing here. On no reasonable theory can Congress be supposed to have contemplated that local law should intervene to vest minerals in the railroad if, as we maintain and believe we have shown, Congress intended to withhold them.[16]

B. THERE HAS BEEN A LONG AND UNIFORM ADMINISTRATIVE CONSTRUCTION, AS WELL AS A CONGRESSIONAL INTERPRETATION, THAT THE "LIMITED FEE" IN SUCH RIGHT OF WAY GRANTS CONVEYS NO INTEREST IN MINERALS

The administrative interpretation placed upon these grants, while not conclusive upon the courts, is nevertheless "pertinent to the construction of the Act." *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 275. While the administrative officials have bowed to the language in the opinion of the Court in *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267 (discussed *supra,* pp. 33–35), and construed grants of a right of way such as here involved as vesting a "limited fee" in the grantee, it has been uniformly ruled over a period of 50 years that such a "limited fee" does not include subsurface minerals, and that the minerals remain the property of the United States.

[16] The Wyoming law is, at best, inconclusive (R. 10).

Within two years of the decision in *Northern Pacific Ry. v. Townsend, supra,* in 1903, the question was presented to the Interior Department whether the Missouri, Kansas and Texas Railway Company could validly execute an oil and gas lease on a portion of its rights of way and terminal ground. Pointing out that the M. K. T. grant was similar to the Northern Pacific grant, Assistant Attorney General Campbell quoted at length from the *Townsend* case and concluded (*Missouri, Kansas and Texas Ry. Co.,* 33 L. D. 470, 471–472 (1905)):

> It will thus be seen that the fee granted the company for its right of way is subject to the conditions expressed in the act and also to those necessarily implied, namely, that it should be used for the purposes designated—that is, for the purpose of maintaining the railroad—and I am clear that under this grant the company is not invested with the right to lease any portion of its right of way for the purposes named in the contract submitted for my consideration. I have therefore to advise that said contract is invalid.

The same view was reiterated a year later when a similar problem as to the right to extract oil from the right of way arose. *Missouri, Kansas and Texas Ry. Co.,* 34 L. D. 504.

More recently, in *Use of Railroad Right of Way for Extracting Oil,* 56 I. D. 206, the Department of the Interior considered the question of the rights of the Great Northern Railway Company in oil underlying its right of way acquired under the 1875 right of way statute. It ruled that, although the company had a

"limited fee" in the right of way, it had no right to use any portion of it for the purpose of drilling for and removing subsurface oil." The opinion is exhaustive and well reasoned. It relied heavily on the decision in *Northern Pacific Ry.* v. *Townsend, supra,* stating (56 I. D. at p. 211):

> It is clear, therefore, from the foregoing decision that any use of a railroad right of way, or any portion thereof, for other than railroad purposes is prohibited. A right of way granted by Congress through the public domain may be used only and exclusively for railroad purposes. And this is true irrespective of whether the use of a portion of the right of way for other purposes interferes with the continued operation of the railroad, since it must be presumed that the entire right of way is essential for railroad purposes. The case of *Northern Pacific Ry.* v. *Townsend, supra,* is susceptible of no other meaning.
>
> That the proposed use by the Great Northern Railway Company of a portion of its right of

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[17] The fact that the Great Northern Railway was later held by this Court to have but an easement in no way detracts from the force of the administrative construction. As pointed out in the *Great Northern* case (315 U. S. at p. 276), this Court had in 1915 erroneously characterized a right of way acquired under the 1875 Act as a limited fee (*Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47), and after that date "administrative construction bowed to the [*Stringham*] case." Thus, after 1915 and prior to this Court's decision in the *Great Northern* case which rectified the earlier error, the Department of the Interior dealt with 1875 Act rights of way as if they were, like the land-grant rights of way, "limited fees." For that reason, the administrative decision on the *Great Northern's* rights reflects the departmental view as to the extent of a railroad's "limited fee" in the right of way.

> way for the purpose of drilling for oil underlying the right of way would contravene the manifest intention of Congress, is plain. No distinction is perceived between the use [of] a portion of a right of way by a homesteader for the purpose of cultivation and the use by the railroad for the purpose of drilling an oil well. If the one use is prohibited, the other must also fall. Both uses suffer from the same vice; neither are for railroad purposes.

This administrative interpretation, consistently followed over an unusually long period of time, that the "limited fees" of railroads in their land-grant rights of way do not carry the right of underlying minerals, has been carried forward in the cases of *State of Wyoming*, 58 I. D. 128, and *Northern Pacific Railroad Co.*, 58 I. D. 160.

To this it may be added that the administrative interpretation has been endorsed by Congress. In Section 1 of the Act of May 21, 1930, ch. 307, Sec. 1, 46 Stat. 373, 30 U. S. C. 301, the Secretary of the Interior is authorized "to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or a mere easement." This demonstrates that Congress was aware of the "limited fee" decisions upon which respondent relies and understood that such a "limited fee" did not attach to the minerals which still remain in the Government. We do not of course suggest that this statute is controlling, but the clear expression of opinion by two of the three coordinate branches of the Govern-

ment on the very question here at issue will be given proper weight by this Court. *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 276–277.[18]

CONCLUSION

We have shown in Point I that Congress intended to reserve all minerals, including those under the railroad right of way, from the grant to the Union Pacific; that such reservation was in accord with the general policy of Congress at the time in dealing with mineral interests in the public domain; and that, even if that purpose had been less clear, the proper rule of construction of Government grants compels a holding that the minerals were reserved to the United States. In Point II, we have shown that previous decisions relating to the technical nature of the title in the right of way conveyed to railroads in the same position as the Union Pacific do not support the conclusion that the ownership of the minerals was transferred to the railroad; and also that the position we advance has the support of long administrative and congressional interpretation. It follows that the Court of Appeals erred in refusing to confirm the ownership of the United States.

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[18] The Court has said (*United States* v. *Freeman,* 3 How. 556, 564–565):

> * * * if it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

Or, as the Ninth Circuit has tersely put it, "the legislative construction of its own act is always potent." *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670, 677.

It is respectfully submitted that the judgment should be reversed and the cause remanded with directions to enter judgment in favor of the United States.

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DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956